

# The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law

Charles R. Lawrence III

It seems as if I have been “teaching Ferguson” all of my adult life. In the fall of 1964 I applied to Yale Law School, and the admissions office encouraged me to supplement my written application with an interview. As I rode a Greyhound bus to New Haven I read James Baldwin’s *The Fire Next Time*,<sup>1</sup> a paperback copy purchased for seventy-five cents just before boarding the bus. The five-hour bus trip passed quickly as I read Baldwin’s intimate, searing, and prophetic words, written as a letter to his nephew:

I know what the world has done to my brother and how narrowly he has survived it. And I know, which is much worse, and this is the crime of which I accuse my country and my countrymen, and for which neither I nor time nor history will ever forgive them, that they have destroyed and are destroying hundreds of thousands of lives and do not know it and do not want to know it ... but it is not permissible that the authors of devastation should also be innocent. It is the innocence which constitutes the crime.<sup>2</sup>

Jack Tate, the dean of admissions at Yale, was a good old boy from Tennessee. I liked him immediately. He seemed genuinely interested in who I was and what I thought. Today I remember none of the questions he asked me except the last: “What is the last book you read for pleasure that was not an assigned reading for one of your classes?” I told him I’d just read Baldwin’s new book and that, while I would not describe my experience as “pleasure,” I found the book profoundly moving. Baldwin was speaking directly to me and also speaking for me, saying many things I knew but had not found the words

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1. JAMES BALDWIN, *THE FIRE NEXT TIME* (1963). I have kept this tiny Dell paperback edition and it still sits on my office bookcase, complete with the underlines and marginal notes I made on that trip.

2. *Id.* at 15-16.

to say. I thought, "... and many things I knew but did not *dare* to say," but was not brave enough to say those words.

Dean Tate told me that he had read an excerpt from Baldwin's book in the *New Yorker* and thought Baldwin's anger was overwrought and unwarranted given America's progress in race relations. He asked me what I thought of Baldwin's assertion that almost all Negroes shared his anger as well as his dark and skeptical view of America's commitment to racial justice. He said that he and his wife had recently discussed the *New Yorker* piece over dinner with friends who were Negroes and that they too thought Baldwin's writing an exaggerated, if eloquent, account of black alienation and anger, and an unwarranted condemnation of white America.

"Are *you* an angry Negro like James Baldwin?" The dean did not say these words, but that was the meaning I heard in his question.

I cannot remember my exact response. The dean's Negro friends sitting at his dinner table must have felt as I did now, trapped by this question that asks us to join the lying, in the bargained for/coerced silence that Baldwin had broken. In my head I recited the first stanza of a Paul Laurence Dunbar poem I had learned as a child:

We wear the mask that grins and lies,  
It hides our cheeks and shades our eyes,  
This debt we pay to human guile;  
With torn and bleeding hearts we smile,  
And mouth with myriad subtleties.<sup>3</sup>

What I said out loud was something vague about recalling that the Negro poet Paul Laurence Dunbar had written a poem about how difficult it was for Negroes to speak with candor to whites about their experiences with racism. I was hoping the dean did not know Dunbar's poem, and I was relieved that he did not press further on the subject.<sup>4</sup>

As I write this essay I find a passage I underlined during my bus ride to that interview fifty years ago. Like Dunbar's poem, it speaks of masks and lies. Baldwin, the angry prophet, adds love:

A vast amount of energy that goes into what we call the Negro problem is produced by the white man's profound desire not to be judged by those who are not white, not to be seen as he is, and at the same time a vast amount of the white anguish is rooted in the white man's equally profound need to be seen as he is, to be released from the tyranny of his mirror. All of us know, whether or not we are able to admit it, that mirrors can only lie, that death by drowning

3. PAUL LAURENCE DUNBAR, *We Wear the Mask*, reprinted in *THE COMPLETE POEMS OF PAUL LAURENCE DUNBAR* 185 (British Library 2013).
4. I left the law school that day certain that I'd blown my chances of admission, but Dean Tate proved me wrong. Several years later when I told this story to Eleanor Holmes Norton she said that she was certain that Tate had admitted me because of rather than in spite of my defense of Baldwin.

is all that awaits one there. It is for this reason that love is so desperately sought and so cunningly avoided. Love takes off the masks that we fear we cannot live without and know we cannot live within.<sup>5</sup>

During my years as a law student at Yale I saw the prophecy of Baldwin's title fulfilled. In 1965, the summer before my first year, Watts erupted in a fiery uprising. The looting and burning went on for six days. The summer after my second year, 1967, saw 159 race riots, with major uprisings in Detroit and Newark.<sup>6</sup> I dropped out of law school for a year to work as an organizer in Philadelphia. In the spring of 1968, just before I returned to Yale for my last year of law school, Dr. Martin Luther King was assassinated, and major riots broke out in Washington, D.C., Baltimore, Louisville, Kansas City, Detroit, and Chicago.<sup>7</sup>

I found law school and the law full of masks, fear, lying, and mirrors, and experienced little of Baldwin's unmasking love. It seemed nearly impossible to learn, much less accept, rules about arms-length bargains, reasonable men, and rationally based laws when my brothers and sisters were burning down their broken neighborhoods. The dissonant juxtaposition of black rage and the law's claims to mutually beneficial rationality and justice upset me and often made me feel that I was going crazy.<sup>8</sup> But my alienation from law school

5. BALDWIN, *supra* note 1, at 128.

6. In Detroit, 800 state police officers, 8,000 National Guardsmen, and 4,700 paratroopers were sent to quell the rioting; 43 people were killed, 1,189 injured, and more than 7,000 arrested. MALCOM McLAUGHLIN, *THE LONG, HOT SUMMER OF 1967: URBAN REBELLION IN AMERICA* (2014). In Newark, six days of rioting left 26 dead. Nancy Solomon, *40 Years on, Newark Re-examines Painful Riot Past* (NPR, July 14, 2007), <http://www.npr.org/templates/story/story.php?storyId=11966375>.

7. Peter Levy writes that between April 4 and 14, 1968: [T]hirty-six states and the District of Columbia experienced looting, arson, or sniper fire. Fifty-four cities suffered at least \$100,000 in property damage, with the nation's capital and Baltimore topping the list at approximately \$15 million and \$12 million respectively. . . . [C]ombined 43 men and women were killed, approximately 3,500 were injured, and 27,000 were arrested. Not until over 58,000 National Guardsmen and army troops joined local state and police forces did the uprisings cease. Put somewhat differently, during Holy Week 1968, the United States experienced its greatest wave of social unrest since the Civil War.

Peter B. Levy, *The Dream Deferred: The Assassination of Martin Luther King, Jr., and the Holy Week Uprisings of 1968*, in *BALTIMORE '68: RIOTS AND REBIRTH IN AN AMERICAN CITY* 3 (Jessica Elfenbein, Elizabeth Nix & Thomas Hollowak, eds., 2011) [hereinafter *BALTIMORE '68: RIOTS AND REBIRTH*].

8. Elsewhere I have described the origins of my scholarship and pedagogy in my efforts to maintain sanity while I learned the law:

I first met Professor Mari Matsuda in 1981 at a small gathering of legal scholars of color at the University of Pennsylvania. I was presenting a work in progress that contained the seeds of the argument that became *The Id, the Ego, and Equal Protection*. Professor Matsuda recalls that, in introducing that piece and explaining the process of its conception, I said, "I write so I know I'm not crazy." I do not remember saying this, but it is surely true. I may have also said, "I hope that my writing will help other people know that they are not crazy," for that has also been a primary motivation in my

and the law, and the truths of Baldwin's words also led, pushed, dragged, and compelled me to a lifelong struggle to "teach/learn Ferguson."<sup>9</sup>

In a 2008 article that revisited my first work on unconscious racism,<sup>10</sup> I sought to articulate my vocational aspirations and practice—what I refer to here as "Teaching Ferguson":<sup>11</sup>

This essay seeks to understand and articulate the injury that racism or white supremacy and its reiteration in the law does to African Americans, to other people of color, and ultimately to us all. I have tried to make this work my vocation. As teacher, activist, and scholar I have aspired to the tradition of radical teaching that historian Vincent Harding has named "The Word." "The Word" articulates and validates our common experience. It seeks the reasons for oppression. It is the practice of struggle against dehumanization.<sup>12</sup>

This tradition has inspired my work since law school, and it guides my effort in this essay. I hear the editors' call for this symposium to ask us to reflect on the events in Ferguson, Missouri, within the context of the legal, cultural, and historical texts and discourses that surround them.<sup>13</sup> The symposium title

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scholarship. I trace this motivation, and thus the origins of this article, to my experience in law school. I was one of only three black students in my first year class, and I recall expending considerable intellectual and emotional energy in an effort to maintain my sanity as I struggled to make sense of a discursive world that rarely reflected my lived experience. I did not have the work of Critical Race Theorists like Derrick Bell, Kim Crenshaw, Patricia Williams, Jerry Lopez, and Mari Matsuda to provide me with an analysis that explained the dissonance between that lived experience and the way the dominant legal discourse described the world. So I wrote to keep from going crazy, to explain to myself and others why the legal analysis of race that my professors, and later my colleagues, presented as wise and just often struck me as foolish or evil. And, I wrote with the hope that in my own struggle to understand what was making me crazy I might help all of us understand the insanity of white supremacy.

Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of The Id, the Ego, and Equal Protection*, 40 CONN. L. REV. 931, 942-43 (2008) [hereinafter Lawrence, *Unconscious Racism Revisited*].

9. In my teaching, I encourage students to acknowledge the dissonance they hear between the law's narrative and their own lived experience with racism and to use the feelings evoked by these conflicting accounts as a first step in critical analysis. I describe this pedagogic method in *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992) [hereinafter Lawrence, *The Word and the River*].
10. See generally Lawrence, *Unconscious Racism Revisited*, *supra* note 8; see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 327-28 (1987) [hereinafter Lawrence, *The Id, the Ego, and Equal Protection*].
11. See Lawrence, *The Word and the River*, *supra* note 9, at 2236-37 (exploring this vocation aspiration in more depth); see also VINCENT HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA*, at xviii-xxi, 82 (1981) [hereinafter HARDING, *THERE IS A RIVER*] (recounting the history of black radicalism in America).
12. Lawrence, *Unconscious Racism Revisited*, *supra* note 8, at 936.
13. See Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) [hereinafter Cover, *The Supreme Court*] (discussing the centrality of stories to the prescriptive functions of social institutions and law). "We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and

suggests that our reflections should focus on pedagogy, from our classrooms and our scholarship—on the lessons that we might teach and learn from these events. The events in Ferguson, Staten Island, Charlotte, Cincinnati, Cleveland, Oakland, Baltimore, Charleston, and more locations of America's persistent human slaughter than I can name or bear to think about, present a number of questions and problems that have been central to my teaching and scholarship. My teaching and writing on unconscious racism, hate speech, school segregation, affirmative action, racial construction, and performance have explored how the law employs deeply rooted racist ideologies and narratives to justify human oppression and structural inequality, and how we internalize, repress, and deny those narratives so that we can deny our participation in human carnage and our responsibility for redressing injury.<sup>14</sup> The Ferguson events are fodder for all of the lessons I have tried to teach and learn.

Each day brings new news of police and vigilante violence against people of color. Mari Matsuda, my partner/colleague/co-author in life, struggle, and love, reads the reports to me from her Twitter feed each morning before we see the morning headlines, and many of these brutalities do not even make it to the front page of *The New York Times*.

As we hear each report of another killing, we feel sad, vulnerable, angry, and frightened for our children. But the response of our young people also brings hope and even joy. Some 50,000 people are marching in the streets of New York, 25,000 in Washington D.C., and thousands more in Los Angeles, San Francisco, Chicago, Atlanta, and Detroit. A St. Louis grand jury has failed

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unlawful, of valid and void. . . . [T]he formal institutions of law and the conventions of social order are . . . but a small part of [this] normative universe." *Id.* See also Charles R. Lawrence III, *Listening for Stories in All the Right Places: Narrative and Racial Formation Theory*, 46 LAW & SOC'Y REV. 247 (2012) [hereinafter Lawrence, *Listening for Stories*].

14. See generally Charles R. Lawrence III, 'Acting Our Color': *Racial Re-Construction and Identity as Acts of Resistance*, 18 UCLA ASIAN PAC. AM. L.J. 21 (2013); Charles R. Lawrence III, *Cringing at Myths of Black Sexuality*, 65 S. CAL. L. REV. 1357 (1992); Charles R. Lawrence III, *Crossburning and The Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787 (1992); Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U. S.F. L. REV. 757 (1997) [hereinafter Lawrence, *Each Other's Harvest*]; Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race Again*, 15 B.C. THIRD WORLD L.J. 1 (1995); Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353 (2005); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection*, *supra* note 10; Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Charles R. Lawrence III, *Listening for Stories*, *supra* note 13; Charles R. Lawrence III, *Local Kine Implicit Bias: Unconscious Racism Revisited (Yet Again)*, 37 U. HAW. L. REV. 457 (2015); Charles R. Lawrence III, *Passing and Trespassing in the Academy: On Whiteness as Property and Racial Performance as Political Speech*, HARV. J. ON RACIAL & ETHNIC JUST., (forthcoming 2015); Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001) [hereinafter Lawrence, *Two Views of the River*]; Charles R. Lawrence III, *Unconscious Racism Revisited*, *supra* note 8; Charles R. Lawrence III, *The Word and The River*, *supra* note 9.

to indict the police officer who killed Michael Brown in Ferguson, Missouri, and in New York the policeman who killed Eric Garner with a chokehold will not stand trial. Students across the nation have moved their protests to the streets. Joining fast-food workers, civil rights organizations, religious groups, celebrity recording artists, and athletes, they march chanting, “Hands up, don’t shoot” and “Black lives matter.” They lie down to stage die-ins, blocking traffic and disrupting business as usual at Harvard, Princeton, Columbia, Berkeley, Howard and campuses across the nation as their compatriots shut down Fifth Avenue in New York, the freeway in Oakland, and Union Station in Washington, D.C. The banners, signs, and T-shirts reading “I can’t breathe,” Eric Garner’s dying words, shout their hurt, rage, sorrow, deep sense of loss, and shared injury.

I write this essay for the young activists who have taken up the struggle, who have responded to Ferguson with a call for justice, who are using Ferguson to teach and to learn, as a forum for understanding the reasons for oppression and a location for the vocation of struggle against dehumanization. The young people at the vanguard of today’s freedom struggle know, as did Baldwin, that we can no longer ignore black anger. Our masks and lies will not suffice to heal our wounds. This fledgling young people’s justice movement has taken the name Black Lives Matter.<sup>15</sup> The name itself shouts the failure of American laws that claim to do racial justice.

I do not intend to reiterate the law’s failures here or to claim that our civil rights laws have achieved nothing. Rather, I will look to our past for lessons from people’s movements in the struggle for racial justice. Our civil rights laws advance racial justice only when these movements successfully contest the morality of racist structures, and challenge the legal and political narratives that justify those structures. The failure of our civil rights laws reflects law’s central role in the maintenance and justification of racism. Laws never create racial justice. Rather, in both their achievements and their failures, laws reflect the results of political struggle. Today’s freedom fighters will learn from those who fought for justice before them. What were our aspirations, our vision, and goals? Why were those aspirations not achieved, and what role has law played in denying racial justice?

Within these brief narratives from our nation’s history you will hear three lessons that are grounded in the work of American critical race theorists, who have sought to understand how a regime of white supremacy and the subordination of people of color is maintained in America and, in particular, to examine how racial power is exercised through the violence and ideology of law.<sup>16</sup>

15. “Black Lives Matter” was first coined by two black women, Alicia Garza and Patrisse Cullors, in response to George Zimmerman’s being found not guilty in the killing of Trayvon Martin. Nishat Kurwa, *‘Black Lives Matter’ Slogan Becomes a Bigger Movement*, NPR (Dec. 4, 2014), <http://www.npr.org/2014/12/04/368408247/black-lives-matter-slogan-becomes-a-bigger-movement>.

16. See generally Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*,

### Three Lessons from Critical Race Theory

Lesson #1: Any law that claims racial justice or human justice as its purpose must transform the status quo. Our nation/empire was and is established and constituted through the plunder, extermination, and exploitation of human beings, rationalized and justified by racialization. Racial justice requires a reconstitution of the nation, of our culture, and of us. A racial justice law must redistribute privilege. It must redistribute both the land and the fruit of the labor that has been plundered, and the status or human dignity that has been denied by the ideology used to justify that plunder.<sup>17</sup>

Lesson #2: All race reform, all racial justice, is achieved through the work of people who join together in justice movements to disrupt systems and institutions of plunder and to contest the racialized narratives that justify that plunder. People's movements do not achieve racial justice by persuading those privileged by institutions and narratives of white supremacy to enact laws redistributing their privilege. Rather, revolutionary transformation comes out of active resistance. It comes from what people in the movement learn about themselves, about their condition, and about their power to change that condition.<sup>18</sup>

Lesson #3: When people's movements successfully challenge and disrupt racist structures and institutions, and contest the narratives of racial subordination, the plunderers will respond with new law. The new laws will inflict new forms of violence and compose new narratives to make the new violence seem just. This does not mean that there is never progress, that the people's movements have not achieved real transformation. The transmutation of transformative change into re-enactment of subordination through quasi-reform is a constant threat. Those who would judge race reform law must recognize when law affirmatively moves society toward transformation and when it resists transformation by inflicting new forms of violence and justificatory narratives. The importance of race reform law is found not so much in the rights guaranteed and enforced by the state, as in how that law reflects our reconception of ourselves as a people who have participated in our own and our nation's transformation.

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101 HARV. L. REV. 1331, 1369-87 (1988); Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1053 (2007).

17. Albie Sachs, *Towards a Bill of Rights in a Democratic South Africa*, 35 S. AFR. J. ON HUM. RTS. 21, 28 (1991) (arguing that a new bill of rights in South Africa must not "enact a 'constitutional freezing of the present unjust and racially enforced distribution of land.'"); see also Lawrence, *The Id, The Ego, and Equal Protection*, *supra* note 9; Lawrence, *Two Views of the River*, *supra* note 14; Lawrence, *Unconscious Racism Revisited*, *supra* note 8; Charles R. Lawrence III, *Unconscious Racism and the Conversation about the Racial Achievement Gap*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* (Justin D. Levinson & Robert J. Smith eds., 2012).
18. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 28 (Myra Bergman Ramos trans., Bloomsbury Acad. 2000) (arguing that "this, then, is the great humanistic and historical task of the oppressed: to liberate themselves and their oppressors as well.").

A final related lesson: We can win in struggle. We can change a nation's view of us. Our freedom struggle will move forward only to the extent that we remember the lessons we teach others and ourselves in the midst of that struggle. We must understand both the power of struggle and the power of law to adapt, resist, accommodate, and retrench to maintain the status quo.

### **A Nation Constituted in Slavery**

On July 4, 1854, William Lloyd Garrison stood before a large crowd of fellow abolitionists who gathered to protest a ruling by a United States Federal Court in Boston ordering the return of Anthony Burns, a fugitive from slavery, to his Virginia owner.<sup>19</sup> Garrison burned the court's decision and a copy of the Fugitive Slave Law of 1850 under which Burns was returned to bondage.<sup>20</sup> Then he held aloft the United States Constitution. Calling it "the parent of all the other atrocities, a covenant with death, an agreement with hell," he set it afire.<sup>21</sup>

Our laws have failed to achieve racial justice because racism has shaped our law's DNA. The United States was established and constituted in law that valued property over humanity. From our nation's beginning, slavery was the foundation of social and economic life, and was "completely interwoven into the passions and prejudices of the American People."<sup>22</sup> The new Constitution made ownership of property basic to individual freedom. The sanctity of property rights was a powerful bulwark of slavery. The nation's economic growth and territorial expansion were achieved largely through slave labor and the dispossession of nonwhite peoples.<sup>23</sup> Racism and the narrative of black inferiority were essential to the hegemony of a Constitution that claimed to "establish justice" and "promote the general welfare" while its provisions valued property over human life. As Cheryl Harris notes, the framers of our Constitution resolved the contradiction between human property and human liberty by positing that blacks were less than human.<sup>24</sup>

19. ERIC FONER, *WHO OWNS HISTORY? RETHINKING THE PAST IN A CHANGING WORLD* 169 (Hill and Wang ed. 2002).

20. *Id.*

21. *Id.*

22. HARDING, *THERE IS A RIVER*, *supra* note 11, at 188 (quoting a speech made by H. Ford Douglas on August 27, 1854).

23. *See generally* WALTER JOHNSON, *RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM* (1<sup>st</sup> ed. 2013); Walter Johnson, Opinion, *King Cotton's Long Shadow*, N.Y. TIMES (Mar. 30, 2013), [http://opinionator.blogs.nytimes.com/2013/03/30/king-cottons-long-shadow/?\\_r=0](http://opinionator.blogs.nytimes.com/2013/03/30/king-cottons-long-shadow/?_r=0) ("It is not simply that the labor of enslaved people underwrote 19th century capitalism. Enslaved people were the capital: four million people worth at least \$3 billion in 1860, which was more than all the capital invested in railroads and factories in the United States combined."); *see also* DAVID E. STANNARD, *AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD* (1993).

24. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1745 (1993) [hereinafter Harris, *Whiteness as Property*].



### **The First Freedom Fighters**

The very presence of black human beings represented a revolutionary challenge to a nation whose constitution made ownership of blacks as property essential to white freedom. Historian Vincent Harding calls the self-liberating defiance of slavery by blacks who ran away by the thousands “the measure of the mainstream of black struggle” prior to the Civil War.<sup>25</sup> “Their lives were concrete challenges to the system of slavery. They defied its power. They robbed its profits. They encouraged and inspired its opponents. In the widening disputes over their escape, recapture, and return, they drove the black wedge of their bodies between the two sections of the nation.”<sup>26</sup> The thousands of blacks who escaped enslavement did more than seize their own freedom. They acted to radically challenge power and created turmoil in the nation. They challenged the primacy of property over humanity as well as the ideology of black inhumanity that rationalized the Constitution’s contradictions.

The Thirteenth, Fourteenth, and Fifteenth Amendments abolished slavery, established equal rights of citizenship, and protected the right to vote for black men. The Radical Republicans of the Reconstruction Congress are seen as principally responsible for establishing the rights enshrined in these amendments, but what gave life and meaning to this new conception of citizenship were the actions of the masses of newly emancipated black Americans. Historian Eric Foner observes that blacks, through their military service in the civil war, their demands to control the conditions under which they worked, and their political mobilization, “challenged the nation to live up to the full implications of its democratic creed and . . . fundamentally altered the Constitution’s definition of Citizenship, for all Americans.”<sup>27</sup> Foner notes that the service of 180,000 blacks in the Union Army “transformed both the nation’s treatment of blacks and blacks’ conception of themselves.”<sup>28</sup> The newly emancipated freedmen and women sought more than an end to the violence and injustices of slavery. They sought independence and autonomy both as individuals and as members of a community itself transformed by emancipation.

Some took new names that reflected the lofty hopes inspired by emancipation—Deliverance Belin, Hope Mitchell, Chance Great. Others relished opportunities to flaunt their liberation from the infinite regulations, significant and trivial, associated with slavery. Freedmen held mass meetings unrestrained by white surveillance; they acquired dogs, guns, and liquor (all forbidden under slavery); and they refused to yield the sidewalk to whites. Blacks dressed as they pleased and left plantations when they desired. They withdrew from churches controlled by whites and created autonomous

25. HARDING, *THERE IS A RIVER*, *supra* note 11.

26. *Id.* at 115.

27. Eric Foner, *Rights and the Constitution in Black Life During the Civil War and Reconstruction*, 74 J. AM. HIST. 863, 870 (1987) [hereinafter Foner, *Rights and the Constitution in Black Life*].

28. *Id.* at 864.

churches, stabilized and strengthened the families they had brought out of slavery, and established a network of independent schools and benevolent societies.<sup>29</sup>

The newly emancipated black community recognized that economic autonomy was essential to freedom, as was inclusion in the political community. Without land they were subject to exploitation by their former owners. "The land ought to belong to the man who could work it," said a former slave.<sup>30</sup> An Alabama freedman in an 1867 speech declared that "all the wealth of the white man has been made by Negro labor, and that Negroes were entitled to their fair share of all these accumulations."<sup>31</sup> In this demand for economic autonomy through land transfer, the black freedom movement demanded a radical solution that challenged the very foundation of a nation constituted to preserve the rights of property. Blacks recognized true freedom also required political inclusion. The black community was highly politicized and took every opportunity to fully exercise the right of suffrage granted by the Fifteenth Amendment. Churches, union leagues, societies, clubs, picnics, and impromptu local meetings became forums for political organizing.

Of course, we all know that this revolutionary notion of freedom and broad conception of rights that the black movement sought to achieve during Reconstruction were never realized. Propertied white men found common cause in retreating from a freedom that would challenge the primacy of property. The national government and federal courts abandoned the freedom movement. Former masters employed fraud, economic coercion, and a reign of terror to strip blacks of the franchise and economic autonomy in what became known as the South's "Redemption." Black Codes, chain gangs and Jim Crow laws replaced the Reconstruction Acts, and the Fourteenth and Fifteenth Amendments were effectively nullified in the South.<sup>32</sup>

This does not mean that the struggle achieved nothing. The struggle itself challenged and disrupted both the concrete institutions and structures of racial subordination and the narrative of black inferiority that rationalized and justified those structures. Black lives demanded work, land, and autonomy, running for and holding office, naming themselves, creating their own schools and organizations, speaking out, exposing the Constitution's lie that slavery can coexist with human freedom, and the larger lie of America's commitment to property over humanity.

### **The New Abolitionists**

Historians often refer to the period that brought an end to the formal legal system of racial segregation in America as the Second Reconstruction. The legal

29. *Id.* at 870.

30. ERIC FONER, NOTHING BY FREEDOM: EMANCIPATION AND ITS LEGACY 84 (1983).

31. Foner, *Rights and the Constitution in Black Life*, *supra* note 27, at 877.

32. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-77 (3d ed. 2002); W.E.B. DuBois, BLACK RECONSTRUCTION IN AMERICA, 1860-1880 (2d ed. 1999).

reform that dismantled segregation began with the Supreme Court's holding in *Brown v. Board of Education*<sup>33</sup> that racial segregation violated the Fourteenth Amendment's Equal Protection Clause and culminated with the passage of the Civil Rights Acts of 1964-65. But the most profound challenge to the old order of American apartheid came from the bottom, and black young people formed the vanguard of that revolt.

The movement began when four freshmen from a Negro college in Greensboro, North Carolina, took seats at a segregated Woolworth's lunch counter.<sup>34</sup> During the next weeks the sit-ins spread to Atlanta, Nashville, and a dozen other cities in the South.<sup>35</sup> By the end of the following year, more than 50,000 people participated in demonstrations and almost 4,000 people had spent time in jail.<sup>36</sup> Out of these demonstrations grew a core of young organizers who left school and family to move into the Deep South to become the front line of a nonviolent guerrilla war on racism.<sup>37</sup> The new movement's members called themselves the Student Nonviolent Coordinating Committee (SNCC).<sup>38</sup> During the next decade these young freedom fighters would wage a campaign in the heart of the Deep South—Southwest Georgia, Alabama, and the Mississippi Delta. They moved into the terror-ridden towns of the old cotton kingdom. Living in the midst of their own people and recruiting them to their ranks, they registered voters, distributed food and clothing, organized schools, and led demonstrations, engaging in civil disobedience, helping long-dormant communities realize their beauty and power.

Historian Howard Zinn called them "The New Abolitionists."<sup>39</sup> Comparing them to Garrison, Phillips, Douglass, Tubman, Turner, and Truth, he writes:

They have a healthy disrespect for respectability; they are not ashamed of being agitators and trouble-makers; they see it as the essence of democracy. . . . The word "revolution" occurs again and again in their speech. Yet they have

33. 347 U.S. 483 (1954).

34. CARSON CLAYBORNE JR., *TOWARD FREEDOM AND COMMUNITY: THE EVOLUTION OF IDEAS ON THE STUDENT NONVIOLENT COORDINATING COMMITTEE, 1960-1966*, at 22 (1975).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. HOWARD ZINN, *SNCC: THE NEW ABOLITIONISTS* (1964). See generally MANNING MARABLE, *RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1982*, (Univ. Press of Miss. 1984). Vincent Harding described "The New Abolitionists":

They were believers. When they sang in jail, in mass meetings, in front of policemen and state troopers, 'We Shall Overcome,' they meant it. Few were certain about details, but they *would* overcome. Vaguely, overcoming meant 'freedom' and 'rights' and 'dignity' and 'justice,' and black and white together, and many other things that people in a movement feel more than they define. But they knew they were part of a revolution, and they believed that if they only persisted in courage, determination, and willingness to suffer, they would make it over.

*Id.* at 63.

no party, no ideology, no creed. They have no clear idea of a blueprint for a future society. But they do know clearly that the values of present American society—and this goes beyond racism to class distinction, to commercialism, to profit seeking, to the setting of religious and national barriers against human contact—are not for them.<sup>40</sup>

Just as the abolitionist and the newly emancipated blacks struggled for a more radical transformation of America than was achieved through the Thirteenth, Fourteenth, and Fifteenth Amendments, the black activists of the 1960s and '70s sought more than the enactment of federal legislation. SNCC organizers recognized the importance of building indigenous leadership, enduring institutions, and political power in local communities. Their vision of freedom went well beyond the ideological confines of racial integration.<sup>41</sup>

The new abolitionists and the movement they inspired played a central role in the fight for federal legislation that became the Civil Rights Acts of 1964 and 1965, but they saw themselves as involved in a freedom struggle rather than an effort to achieve civil rights reform. In the very acts of protest, organizing, teaching, learning, standing up, and speaking out in the face of violence, in caring for and being cared for by the communities where they organized, these young rebels challenged the story of black inferiority. They created new social identities for themselves and for all African-Americans. National television captured their courage and dignity as they faced angry mobs, endured brutal beatings, arrest, jail, and death. They disturbed the moral comfort of white America and caused an identity crisis for the nation. Perhaps most important, they learned the beauty and strength of their own humanity. With each act of resistance they gained a growing recognition that they had the power to alter the conditions of their lives.

Once the fight against legalized segregation is won, what is next? What does freedom mean? So much had been won. The Civil Rights Act of 1964 outlawed Jim Crow in public accommodations in every city and state.<sup>42</sup> The Voting Rights Act of 1965 had even greater scope.<sup>43</sup> Federal examiners were sent into the South to safeguard the black franchise. Between 1964 and 1969, the percentage of blacks registered to vote rose from 19.3% to 61.3% in Alabama, from 27.4% to 60.4% in Georgia, and from 6.7% to 66.5% in Mississippi.<sup>44</sup>

40. MARABLE, *supra* note 39, at 8-13.

41. Historian Clayborne Carson writes that the SNCC activists were especially drawn to mentors like the radical pacifist James Lawson, who encouraged them "to transform the lunch counter sit-ins into a non-violent revolution to destroy segregation slavery, serfdom, paternalism and industrialization which preserves cheap labor and racial discrimination." Clayborne Carson, *Rethinking African-American Political Thought in the Post Revolutionary Era*, in *THE MAKING OF MARTIN LUTHER KING AND THE CIVIL RIGHTS MOVEMENT* 115-27, 118 (Brian Ward & Tony Badger eds., 1996).

42. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

43. Voting Rights Act of 1965, Pub. L. No. 109-246, 120 Stat. 577 (1965).

44. STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969*, at 321-29 (1976).

But as W.E.B. DuBois had warned, the abolition of Jim Crow would not destroy the economic prerequisites of private capital over black lives.<sup>45</sup> White liberals and the business community had supported civil rights legislation. Racial segregation had become an international embarrassment to a nation committed to democracy and human equality. As historian Manning Marable noted,

Eastern U.S. capital and the multinational corporations had no direct historic commitment to the maintenance of rigid caste divisions within the American working class. . . . If desegregation could provide the necessary civil order to maintain private capital accumulation why not ratify federal legislation to that effect? Racism itself—the systematic exploitation of black labor power and the political and cultural hegemony of capital’s interests over black labor—would still remain intact.<sup>46</sup>

The formal equality written into the new antidiscrimination laws was clearly not a solution to historically entrenched racism and poverty. In 1963, the unemployment rate for whites was 5.0%; for nonwhites, it was 10.9%.<sup>47</sup> About a fifth of the white population had incomes below the poverty line, compared with about half the black population.<sup>48</sup> In 1967, the unemployment rate for black youth between the ages of sixteen and nineteen was 26%, twice that of white youth.<sup>49</sup>

“A riot is the language of the unheard,” said Dr. Martin Luther King in explaining the urban violence that erupted across America in the 1960s.<sup>50</sup> In 1964 and 1965 there were black uprisings in Cleveland, New York, Chicago, Philadelphia, and Jersey City. In Los Angeles, the black community of Watts erupted in the most violent urban outbreak since World War II.<sup>51</sup> 1967 saw the greatest outbreak of urban uprisings in American history.<sup>52</sup> The National Advisory Commission on Civil Disorders reported eight major uprisings, thirty-three “serious but not major” outbreaks and one hundred twenty-three “minor disorders.”<sup>53</sup> The report named “white racism” as the cause, noting in

45. W.E.B. DuBois, *THE EDUCATION OF BLACK PEOPLE: TEN CRITIQUES*, 1906-1960, at 149-155 (1973).

46. MARABLE, *supra* note 39.

47. Algernon Austin, *The Unfinished March: An Overview*, ECON. & POLICY INST. (Jun. 18, 2013), <http://www.epi.org/publication/unfinished-march-overview/>.

48. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (KERNER REPORT) 7 (1968) [hereinafter KERNER REPORT].

49. J. Herman Black, *Social Change in the Sixties: The Black University and Its Community*, NEGRO DIG., March 1968, at 21, 31.

50. Dr. Martin Luther King Jr., Speech at Stanford University: The Other America (Apr. 14, 1967).

51. HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 337 (2003).

52. KERNER REPORT, *supra* note 48, at 15.

53. *Id.* at 3.

particular “pervasive discrimination in employment, education, and housing . . . growing concentrations of impoverished Negroes in our major cities, creating a growing crisis of deteriorating facilities and services and unmet human needs.”<sup>54</sup>

New urban rebellions erupted in 1968, after the assassination of Dr. Martin Luther King.<sup>55</sup> King had planned a massive poor people’s march and encampment in Washington, D.C., to call attention to the problems left untouched by the civil rights laws.<sup>56</sup> He believed that only a massive, militant, and disruptive protest could fully express the feelings of rage in the black community and force Congress to remedy the conditions that produced that rage. A year before his death King had called for new confrontational tactics:

Nonviolent protest must now mature to a new level to correspond to heightened black impatience and stiffened white resistance. This higher level is mass civil disobedience. There must be more than a statement to the larger society; there must be a force that interrupts its functioning at some key point.<sup>57</sup>

There was indeed a disruptive force that had interrupted business as usual in America, but that force was hardly nonviolent. The combined human and property costs of the urban rebellions from 1964 to 1972 were enormous: more than 250 deaths, 10,000 serious injuries, 60,000 arrests, and a cost in police, troops, and losses to business in the billions of dollars.<sup>58</sup>

In our book *We Won’t Go Back: Making the Case for Affirmative Action*, Mari Matsuda and I argued that the politics of black power, community control, and the movement that demanded affirmative action were forged in the fire of these urban rebellions and were based on the new abolitionists’ conception of racial justice as transformative.

The new Abolitionists understood that only when the conditions of poverty and the prerogatives of privilege were eliminated would all persons truly belong to America. They knew that this required the elimination of institutional barriers to inclusion, not just outlawing open bigotry. In this realization lay the seeds of the struggle for affirmative action. . . .<sup>59</sup>

. . . .

54. *Id.* at 90.

55. Peter B. Levy, *The Dream Deferred: The Assassination of Martin Luther King Jr., and the Holy Week Uprisings of 1968*, in *BALTIMORE ’68: RIOTS AND REBIRTH*, *supra* note 7, at 3.

56. See David J. Garrow, *From Reformer to Revolutionary*, in 2 *MARTIN LUTHER KING JR.: CIVIL RIGHTS LEADER, THEOLOGIAN, ORATOR* 431 (David J. Garrow ed., 1989).

57. *MARTIN LUTHER KING JR., THE TRUMPET OF CONSCIENCE* 15 (1967).

58. MARABLE, *supra* note 39, at 92-93.

59. CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 13, 19 (1997) [hereinafter LAWRENCE & MATSUDA, *WE WON’T GO BACK*].

Across the nation, community activists ran candidates for office at every level—from unions, to school boards, to city councils, to Congress. Black mayors were elected. . . . Black farming cooperatives were established . . . chapters of the Black Panthers, the Congress of Racial Equality and a host of other community-based organizations established breakfast programs for children, housing cooperatives, health clinics, freedom schools, theatres and art institutes. . . . Black and Puerto Rican parents in Brooklyn and Harlem demanded community control of neighborhood public schools . . . and in cities across the country, communities of color, long the victims of police brutality, sought increased control of police and greater representation on the police force.<sup>60</sup>

Historian Clayborne Carson writes that, in contrast to the prevailing scholarly conception that suggests the civil rights movement ended in 1965 with the passage of the Voting Rights Act, grass-roots activists in the movement stressed the continuity between the struggles to gain political rights for Southern blacks and the struggles to exercise those rights in meaningful ways and change the conditions of black people's lives.<sup>61</sup> "Rather than claiming that a black power movement displaced the civil rights movement, they would argue that a black freedom movement seeking generalized racial advancement evolved into a black power movement toward unachieved goals of the earlier movement."<sup>62</sup>

Again, as in earlier freedom movements, what these community activists learned in the process of struggle was more significant than what they achieved through legislation or the courts. The plunderers' and the law's initial response to disruption was a combination of direct repressive violence and compromise.

The most radical organizations and voices were targeted by FBI infiltration, police violence, and imprisonment. The new generation of black activists was easily portrayed in the stereotypes of dangerous, violent, and criminal that lurked in the psyches of white Americans. In 1968, J. Edgar Hoover declared the Black Panther Party the "number one threat to national security" and launched COINTELPRO.<sup>63</sup> Richard Nixon appealed to these same fears in his presidential campaign that marked the beginning of Republican political dominance in the Southern states.<sup>64</sup> Liberals who had supported civil rights legislation joined the backlash in the face of calls for structural equality. In an analysis of the 1966 elections in *Commentary*, Daniel Patrick Moynihan concluded that "the electorate is fed up to the teeth with demonstrations and riots and perhaps more particularly with the assertion of the right to resist and

60. *Id.* at 19-20.

61. Clayborne Carson, *Civil Rights Reform and the Black Freedom Struggle*, in *THE CIVIL RIGHTS MOVEMENT IN AMERICA* 27 (Charles W. Eagles ed., 1986).

62. *Id.*

63. *Id.*

64. *Id.*

open threats of violence.”<sup>65</sup> A year later, Moynihan admitted that Congress had failed to enact real economic reforms, observing that “plain physical fear of the Negro is now a political face of American life and not a happy one for liberals.”<sup>66</sup>

Powerful institutions also made token concessions to the demands for full equality in an effort to purchase peace. But, as earlier generations of freedom fighters had learned, power rarely yields more than is necessary to bring about a temporary cease-fire. Student demands for open admissions were answered with small minority admissions programs, later attacked as preferential quotas.<sup>67</sup> When community activists demanded participation in the hiring and firing of police, governments established police practice review boards with little actual power.<sup>68</sup> When ghetto organizers sought control over the award of contracts for construction and services in their neighborhoods, they got small set-aside programs, many of which the courts eventually struck down.<sup>69</sup> The transformative ideal of affirmative action as a vehicle for community power became a mechanism for co-optation.

Michael Omi and Howard Winant gave the name “racial projects” to the discursive and cultural initiatives that contest, organize, and explain the distribution of political and material resources along racial lines.<sup>70</sup> The dominant racial project in America is the project of white supremacy, and this project’s paradigmatic narrative is the story of white superiority and black

65. Daniel P. Moynihan, *The President & The Negro: The Moment Lost*, COMMENT. MAG. (Feb. 1, 1967), <https://www.commentarymagazine.com/article/the-president-the-negro-the-moment-lost/>.

66. Daniel P. Moynihan, *The Democrats, Kennedy & the Murder of Dr. King*, COMMENT. MAG. (May 1, 1968), <https://www.commentarymagazine.com/article/the-democrats-kennedy-the-murder-of-dr-king/>.

67. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (upholding affirmative action policies); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding affirmative action admissions policy used by law school stating that the school had a compelling interest to promote diversity); *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (remanding case while stating that affirmative action admissions policies need to be analyzed under strict scrutiny which the lower court failed to do); LAWRENCE & MATSUDA, *WE WON’T GO BACK*, *supra* note 59, at 44-58; Lawrence, *Each Other’s Harvest*, *supra* note 14; Lawrence, *Two Views of the River*, *supra* note 14.

68. See U.S. COMM’M ON CIVIL RIGHTS, *REVISITING WHO IS GUARDING THE GUARDIANS? A REPORT ON POLICE PRACTICES AND CIVIL RIGHTS IN AMERICA* 62 (2000) (“[S]ince 1981, when the Commission published *Guardians*, few changes have been implemented to improve the effectiveness of external controls of police misconduct. . . . Civilian review boards across the country still lack adequate funding, resources, and support to properly address the thousands of complaints they receive each year.”).

69. *Richmond v. Croson*, 488 U.S. 469 (1989) (striking down Richmond’s preference program for minority business enterprises, declaring it a violation of the equal protection clause); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (requiring racial classifications imposed by federal government contracts be analyzed under strict scrutiny review); see also Mitchell F. Rice, *Government Set-Asides, Minority Business Enterprises, and the Supreme Court*, 51 PUB. ADMIN. REV. 114, 114-22 (1991).

70. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (3d ed. 2015).



inferiority. The new narrative of white supremacy that our children hear is less transparent than the old. This narrative claims that race has no consequence, or that each of us may choose his or her racial identity. I call this story the “Big Lie” because its claim that we are colorblind denies the continued existence of racism.<sup>71</sup> White supremacy requires this new version of the old story because antiracist movements have achieved significant successes in contesting the narrative that justified racial subordination by the enslaver’s lash and the colonizer’s gun. The master’s method has shifted, if only in emphasis, from domination to hegemony.<sup>72</sup>

The law—legislation, judicial interpretation, executive enforcement, and the legal discourse surrounding these enactments—plays a significant role in telling the “Big Lie” of post-racialism that shapes much of today’s political and cultural discourse.<sup>73</sup> During the past 30 years, a Supreme Court dominated by conservative justices has touted a legal ideology of formal equality. The Court has adopted rules and doctrine that require a showing of intentional racial animus to prove discrimination and that forbid attention to race in designing affirmative remedies for past or entrenched institutional racism.<sup>74</sup> These rules ignore so much of what we know about human behavior and history, and define racism so narrowly that, for legal purposes, racism is rendered nearly nonexistent. As critical race theorist Kimberlé Crenshaw notes:

[P]ost-racial discourse today operates not only to de-historicize race in American society, but also to reframe the contours of this contemporary moment as constituting the opposite of what preceded it. By these lights, a post-racial America is a racially egalitarian America, no longer measured by sober assessments of how far we have come, but by congratulatory declarations that we have arrived.<sup>75</sup>

71. I have used the term “Big Lie” to name the way that the law uses the intent requirement to deny the existence of past and ongoing racism. Charles R. Lawrence III & Mari J. Matsuda, *The Big Lie: Colorblindness and the Taboo Against Honest Talk About Race*, in LAWRENCE & MATSUDA, *WE WON’T GO BACK*, *supra* note 59, at 67.
72. See HOWARD WINANT, *RACIAL CONDITIONS: POLITICS, THEORY COMPARISONS* 29-32 (1994) (describing how the move from racial subordination through domination to racial subordination through hegemony requires a new narrative).
73. See Cover, *The Supreme Court*, *supra* note 13; Lawrence, *Listening for Stories*, *supra* note 13.
74. See generally Lawrence, *The Id, The Ego, and Equal Protection*, *supra* note 10; Lawrence, *Unconscious Racism Revisited*, *supra* note 8; Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599 (2009); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. (2007); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307 (2010); see also Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).
75. Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 CONN. L. REV. 1253, 1314 (2011); see also Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?* 98 GEO. L.J. 967 (2010); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010).

### The Massacre in Charleston: A Contemporary Historical Reprise

It seems I cannot write this paper quickly enough.<sup>76</sup> In the weeks since the editors of the journal asked me to contribute to this symposium, yet another act of racist terror reminds us of the long shadow that slavery still casts over the nation. A young white man entered a black church in Charleston, South Carolina.<sup>77</sup> The congregants welcomed him to their prayer meeting and Bible study class.<sup>78</sup> After sitting with them for an hour, the young man suddenly rose, drew a gun, and announced that he had come “to shoot black people”: “You’ve raped our women and you are taking over the country,”<sup>79</sup> he said as he opened fire, killing the Rev. Clementa Pinckney, Tywanda Sanders, the Rev. Sharonda Singleton, Cynthia Hurd, the Rev. DePayne Middleton-Doctor, Ethel Lance, Susie Jackson, Myra Thompson, and the Rev. Daniel Simmons.<sup>80</sup>

Our first response is horror, then grief, and a search for explanations. Charleston’s mayor calls the act “pure, concentrated evil” and says, “To have a horrible hateful person go into a church and kill people there . . . is beyond

76. As I make the final edits on this essay in late August of 2015, more than a year after Michael Brown was killed in Ferguson, I read of yet another black life slain by police violence. John Eligon, *Black Man Shot by Police in St. Louis Died from Bullet to Back*, N.Y. TIMES (Aug. 22, 2015), <http://www.nytimes.com/2015/08/22/us/black-man-shot-by-police-in-st-louis-died-from-bullet-to-back.html?ref=todayspaper>. It is difficult to calculate the number of people who lose their lives as a result of police violence, because police departments are not required to report this information. John Swaine, Oliver Laughland & Jamiles Lartey, *The Counted: People Killed by Police in the US*, THE GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/about-the-counted> (last accessed: Aug. 28, 2015). The FBI has only a voluntary reporting system where law enforcement agencies may report justifiable homicide, defined as “the killing of a felon in the line of duty.” *Id.* What follows is only a partial list of those who have lost their lives within the past year from police violence: Christian Taylor, Darius Graves, Allan F. White III, Jean Paul Falgout, Derek Wolfsteller, Samuel Dubose, Darius Stewart, Albert J. Davis, Salvado Ellswood, Johnny Ray Anderson, John Deming Jr., Richard Munroe, Victo LaRosa III, Douglas M. Buckley, Kevin L. Judson, Allan L. Bellew, Spencer L. McCain, Joshua Dyer, Adrian Simental, Kris Jackson, Ryan K. Bolinger, Rudy Baca, James D. Bushey, Ebin Proctor, Feras Morad, Michael Lowrey, Matthew Coates, Brendon K. Glenn, Terrance Kellom, Billy Joe Patrick, William Chapman, Daniel Covarrubias, Frank Shephard III, Ernesto Flores, Celin Nunez, Walter L. Scott, Eric C. Harris, Nicholas Thomas, Jamison Childress, Brandon Jones, Bobby Gross, Anthony Hill, Tony Robinson, Naeschylus Vinzant, Sergio A. Navas, Derek Cruice, Thomas L. Allen Jr., Charly Leundeau Keunang, Deven Guilford, Ernesto J. Canepa Díaz, Daniel Elrod, Rubén García Villalpando, Dillon Taylor, Michael S. Ireland, Cody Evans, Antonio Zambrano-Montes, John Sawyer, Jeremy Lett, David Kassick, Ralph Willis III, Joshua O. Garcia, Joseph Caffarello, Autumn Steele, Leslie Sapp, Matthew Hoffman, Dennis Grigsby, Romain Brisbon, Tamir Rice, Akai Gurley, Carlos M. Perez Jr., Jack Jacquez, Cameron Tillman, Ezell Ford. Richard Pérez-Peña, *Fatal Police Shootings: Accounts Since Ferguson*, N.Y. TIMES (Apr. 8, 2015), [http://www.nytimes.com/interactive/2015/04/08/us/fatal-police-shooting-accounts.html?emc=eta1&\\_r=0](http://www.nytimes.com/interactive/2015/04/08/us/fatal-police-shooting-accounts.html?emc=eta1&_r=0).

77. Ralph Ellis *et al.*, *Shooting Suspect in Custody after Charleston Church Massacre*, CNN (Jun. 18, 2015), <http://www.cnn.com/2015/06/18/us/charleston-south-carolina-shooting/>.

78. *Id.*

79. *Id.*

80. *Id.*

any comprehension and is not explained.”<sup>81</sup> South Carolina’s governor says, “We woke up today, and the heart and soul of South Carolina was broken.”<sup>82</sup> President Obama calls once again for gun control and says, “The fact that this took place in a black church obviously also raises questions about a dark part of our history.”<sup>83</sup>

Although some try to portray gunman Dylann Storm Roof as an isolated demented individual, Roof had posted photographs of himself wrapped in racist regalia, including a Confederate flag like the one flying at the time at the state’s Capitol. On the morning after the killings, the African-American journalist and political commentator Ta-Nehisi Coates called upon the state of South Carolina to remove the Confederate flag from its Capitol grounds, noting that “Roof’s crime cannot be divorced from the ideology of white supremacy . . . nor from its potent symbol—the Confederate flag.”<sup>84</sup> Coates responded to the flag’s defenders, who claim it represents “heritage not hate,” by quoting the Confederacy’s founders:<sup>85</sup>

Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.<sup>86</sup>

Four days later, *The New York Times* called for the flag’s removal on its editorial page, and the following day its front-page headline read, “Governor Joins the Call to Take Down Rebel Flag.”<sup>87</sup> At a news conference, surrounded by Democratic and Republican lawmakers, including both of the state’s United States senators, Gov. Haley said that a symbol long revered by many Southerners was for some, after the church massacre in Charleston, “a deeply

81. Jeffrey Collins & Russ Bynum, *White Gunman Arrested in Slaying of 9 During Bible Study Inside Historic Black Church*, STAR TRIB. (Jun. 19, 2015), <http://www.startribune.com/shooting-in-downtown-charleston-south-carolina/308050931/>.

82. *Governor on Shooting: ‘Heart and Soul of South Carolina was Broken’*, NBC NEWS (Jun. 18, 2015), <http://www.nbcnews.com/video/governor-on-shooting-heart-and-soul-of-south-carolina-was-broken-467549251657>.

83. Barrack Obama, Statement by the President on the Shooting in Charleston, South Carolina (Jun. 18, 2015), WHITE HOUSE PRESS BRIEFING ROOM, <https://www.whitehouse.gov/the-press-office/2015/06/18/statement-president-shooting-charleston-south-carolina>.

84. Ta-Nehisi Coates, *Take Down the Confederate Flag—Now*, THE ATLANTIC (Jun. 18, 2015), <http://www.theatlantic.com/politics/archive/2015/06/take-down-the-confederate-flag-now/396290/>.

85. *Id.*

86. Confederate Vice President Alexander Stephens, Cornerstone Speech (Mar. 21, 1861), in Henry Cleveland, ALEXANDER H. STEPHENS IN PUBLIC AND PRIVATE: WITH LETTERS AND SPEECHES, BEFORE, DURING, AND SINCE THE WAR 721 (Philadelphia, Nat’l Pub. Co. 1886).

87. *Governor Joins the Call to Take Down Rebel Flag*, N.Y. TIMES, Jun. 23, 2015, at A1.

offensive symbol of a brutally offensive past.”<sup>88</sup> *The Times* said that Gov. Haley had done something that “just a week ago seemed politically impossible.”<sup>89</sup> In Mississippi, a Republican legislator called for the removal of their state flag, which includes a Confederate banner.<sup>90</sup> Wal-Mart said it will remove Confederate flag merchandise from its stores, and eBay announced that it will no longer allow such sales.<sup>91</sup>

Within this story of horrible murders and America’s response, we find all of the elements of Critical Race Theory’s lessons on race and the law.

### 1. *Dylann Roof and Chief Justice Roger Taney*

The young white man acts and speaks in the language of old-fashioned racism, explicit in its expression of white supremacist ideology, of racist tropes filled with fear of black invasion, domination and sexuality. We recognize this still living demon from our past. Black folk hear the news and feel the terror as if we were present, knowing that we might well have been in that prayer circle, knowing that the killer cared not which of us he killed. Each of us experiences anew the fear, the vulnerability inflicted upon us by the slave-driver’s lash, the lynch mob, the Klan riding in white hoods, bombing a church and killing four little black girls,<sup>92</sup> burying the bodies of three SNCC workers in a muddy river bank.<sup>93</sup> We know that we are always disciplined by the presence of this terror. We feel not just the terror and deep grief, but also the defamatory meaning in the act of killing—a meaning that defines our lives: “Black lives do not matter.”

Roof’s act echoes the law’s clear and unambiguous rendering of black life in *Dred Scott v. Sandford*<sup>94</sup> that blacks “had no rights which the white man was bound to respect.”<sup>95</sup> By positing that blacks were less human, “the laws did not mandate that blacks be accorded equality under law because nature—not man, not power, not violence—had determined their degraded status.”<sup>96</sup>

88. *Id.*

89. *Id.*

90. Jeremy Diamond, *Confederate Flag Debate Sweeps South*, CNN POLITICS (Jun. 24, 2015), <http://www.cnn.com/2015/06/23/politics/confederate-flags-southern-states-debate-legislators/>.

91. ASSOCIATED PRESS, *Big Retailers Feel Pressure on Confederate Flag Merchandise*, N.Y. TIMES, Jun. 23, 2015, <http://www.nytimes.com/aponline/2015/06/23/us/ap-us-confederate-flag-future.html>.

92. Michael Martinez and Catherine E., *Charleston Church Attack Harks Back to 1963 Birmingham Bombing*, CNN (Jun. 21, 2015), <http://www.cnn.com/2015/06/19/us/birmingham-charleston-church-attack-comparisons/>.

93. Jerry Mitchell, *Congressional Honor Sought for Freedom Martyrs* (Feb. 4, 2014) <http://www.usatoday.com/story/news/nation/2014/02/03/mississippi-burning-martyrs/5191123/>.

94. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

95. *Id.* at 407.

96. Harris, *Whiteness as Property*, *supra* note 24, at 1745.

2. “Take Down the Flag”: Denying Racism in *Plessy* and *Brown*

In the story of the call to take down South Carolina’s Confederate Flag we see a reenactment of two landmark Supreme Court cases, *Plessy v. Ferguson*<sup>97</sup> and *Brown v. Board of Education*.<sup>98</sup> These cases teach my second lesson about how the law responds to freedom movements when they challenge white supremacy, first by denying racism and then by crafting a new narrative that rationalizes its continuing violence.

This was not the first time blacks had called for the removal of the Confederate flag from South Carolina’s Capitol. The South Carolina state legislature first voted to fly the flag over the Statehouse in 1962 in what was then a self-proclaimed expression of defiance of efforts to expand the civil rights of black Americans.<sup>99</sup> Blacks had petitioned for its removal since that time, making the same arguments about its meaning that have been made in the wake of the recent Charleston killings. In 1999 the NAACP declared an economic boycott against South Carolina that remained in effect.<sup>100</sup> White politicians in South Carolina and elsewhere in the South refused to remove the flag, arguing that the flag symbolized the sacrifices of their Civil War ancestors, not racism.<sup>101</sup>

The U.S. Supreme Court made the same argument in *Plessy v. Ferguson*, the case that upheld a law requiring racially segregated railroad cars under the separate-but-equal doctrine. In response to Homer Plessy’s argument that segregation laws announced the state’s designation of him as inferior, the court replied that segregation was Southern custom that had no racist meaning, that any racist inference must be entirely in black folks’ heads, or, in the contemporary parlance of post-racial discourse, that Plessy was just “playing the race card.”<sup>102</sup>

[T]he underlying fallacy of the plaintiff’s argument consists in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act but solely because the colored race chooses to put that construction on it.<sup>103</sup>

97. 163 U.S. 537 (1896).

98. 347 U.S. 483 (1954).

99. Frances Robles, Richard Fausset & Michael Barbaro, *Nikki Haley, South Carolina Governor, Calls for Removal of Confederate Battle Flag*, N.Y. TIMES (Jun. 22, 2015), <http://www.nytimes.com/2015/06/23/us/south-carolina-confederate-flag-dylann-roof.html>

100. *Id.*

101. *Id.*

102. Ian Haney López, *FREEDOM, MASS INCARCERATION, AND RACISM IN THE AGE OF OBAMA*, 62 ALA. L. REV. 1006, 1010 (2010) (stating that “public discourse tells us that the first person to mention race is the racist, an indictment frequently made through the claim that someone is ‘playing the race card.’”).

103. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

In *Plessy* the Court constructs a narrative that denies the history of violence, lynching and disenfranchisement that struck back against the first Reconstruction's freedom movement and was encoded in and enforced through Jim Crow law.<sup>104</sup> The Court's narrative, like that of the contemporary defenders of the Confederate flag, pretends not to know what we all can plainly see.<sup>105</sup>

Nearly sixty years later in *Brown v. Board of Education*, the Supreme Court rejected the *Plessy* Court's assertion that segregation did not mark blacks as inferior and declared the legalized race segregation in public schools inherently unequal. Blacks had challenged the meaning of segregation with their lives, and, in the wake of a war fought against the Nazis and in the midst of an ideological cold war with the Soviet Union, the *Plessy* Court's denial of segregation's racist purpose and meaning became untenable.<sup>106</sup> Although the Court in *Brown* had held segregation in public schools unconstitutional, and shortly after made clear that segregation in other state-run public facilities was also invalid, the white and colored signs remained in place in the South.

A full decade would pass before Congress enacted the 1964 Civil Rights and 1965 Voting Rights Acts. As with the first Reconstruction, the real work of transformation that produced these laws was done in the streets by the new abolitionists. The Civil Rights Acts, like *Brown*, failed to address the full measure of segregation's harm. The new laws took down the signs and symbols of segregation but did nothing to remedy the material inequalities that segregation had created, maintained, and made part of the structure of society's socioeconomic relations and institutions.<sup>107</sup>

The new abolitionists of the Black Lives Matter movement face the same challenge as their predecessors in the Black Freedom movement 50 years ago. Here again those in power offer to take down the visible signs and symbols that designate their inferiority and non-citizenship. From the capitols of South Carolina and Mississippi to the corporate offices of Wal-Mart and NASCAR, the powerful are rushing to take down the Confederate flag. But the violence of

104. See generally C. VAN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2001).

105. *Plessy*, 163 U.S. at 557 (stating that "the thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.").

106. See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2011) (arguing that "the segregation challenged in these cases damaged U.S. prestige abroad and threatened U.S. foreign relations. In the context of heightened Cold War tensions, the stakes in these cases were very high.").

107. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1845 (1994) (stating that "race-neutral policies, set against an historical backdrop of racial segregation and thus against a contemporary backdrop of racially identified space . . . predictably reproduce and entrench racial segregation and the racial-caste system that accompanies it."); see also Priya S. Gupta, *Governing the Single-Family House: A (Brief) Legal History*, 37 U. HAW. L. REV. 187 (2015) (offering a detailed history of government participation in residential segregation).

structural and institutional racism remains in place, as does the Constitution's broader commitment to property over humanity.

The protests in the streets respond to the most egregious forms of state violence against people of color. The murders of Trayvon Martin, Michael Brown, and Eric Garner, and the nine parishioners at Charleston's AME church, like lynching, do more than punish without due process. They signify the state's contempt for and failure to recognize black humanity. The chant "black lives matter" contests this signification even as it cries out against unjust and unjustified murder. Black Lives Matter challenges the continuing legacy of *Plessy*'s ratification of "status property" in whiteness.<sup>108</sup> It contests *Brown*'s protection of white expectations of race-based privilege and its denial and continuing justification of structural racism and violence.

At a deeper level, Black Lives Matter articulates the everyday violence visited on black communities by the savage inequalities of segregated schools,<sup>109</sup> by unemployment, and an ever-increasing wealth gap,<sup>110</sup> by our disproportionate numbers in prisons<sup>111</sup> and our declining numbers in universities and the

108. *Brown* fails to articulate segregation's impermissible purpose of maintaining white supremacy, further maintaining the continuing "status" injury of the racial meaning of de facto segregation. See Lawrence, *The Id, the Ego and Equal Protection*, *supra* note 8 at 342; see also Lawrence, *Unconscious Racism Revisited*, *supra* note 8 at 939.

109. CIVIL RIGHTS PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 15 (2014), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf> [<http://perma.cc/64EH-7JDU>] ("In schools that are 81-100% black & Latino, over three-quarters of the students are also enrolled in schools where more than 70% of the students live in poverty. In fact, half of students in 91-100% black & Latino schools are in schools that also have more than 90% low-income students. This means that these students face almost total isolation not only from white and Asian students but also from middle class peers as well. These figures represent extreme overlaps of poverty and racial concentration and help to explain why schools with high concentrations of black and Latino students often have fewer educational resources and lower student outcomes."); see also CIVIL RIGHTS PROJECT, SORTING OUT DEEPENING CONFUSION ON SEGREGATION TRENDS (2014), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/sorting-out-deepening-confusion-on-segregation-trends/Segregation-Trends-Dispute-CRP-Researchers.pdf> [<http://perma.cc/9DP4-4WL5>].

110. Chris Matthews, *Wealth and Inequality in America: It's Worse Than You Think*, FORTUNE (Dec. 31, 2014), <http://fortune.com/2014/10/31/inequality-wealth-income-us/> ("[T]he share of total household wealth owned by the top 0.1 percent increasing to 22 percent in 2012 from 7 percent in the late 1970s. The top 0.1 percent includes 160,000 families with total net assets of more than \$20 million in 2012.") (internal quotations omitted) (quoting Emmanuel Saez & Gabriel Zucman, *The Explosion in U.S. Wealth Inequality Has Been Fuelled by Stagnant Wages, Increasing Debt, and a Collapse in Asset Values for the Middle Classes*, LONDON SCH. ECON. & POL. SCI. BLOG (Oct. 29, 2014), <http://blogs.lse.ac.uk/usappblog/2014/10/29/the-explosion-in-u-s-wealth-inequality-has-been-fuelled-by-stagnant-wages-increasing-debt-and-a-collapse-in-asset-values-for-the-middle-classes/>; see also DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1998).

111. See also AM. CIVIL LIBERTIES UNION, COMBATING MASS INCARCERATION—THE FACTS (2011), <https://www.aclu.org/combating-mass-incarceration-facts-0>; *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> [<http://perma.cc/EB74->

professions.<sup>112</sup> Most black children will not die at the hands of the police, but black and brown children who attend segregated schools are “more likely to be poor, more likely to go to jail, less likely to graduate from high school, to go to college, or to finish if they go. They are more likely to live in segregated neighborhoods as adults. Their children are more likely to attend segregated schools, repeating the cycle.”<sup>113</sup>

So the chief lesson from the past for the young people who now carry the abolitionist banner is to know that they must be the agents of transformation. They must expose the lies in the law’s narrative and speak directly to the people—talking back, resisting power, telling the rest of us that we have always been the authors of our own freedom. They must know that Black Lives Matter is about saving all of our lives, about reconstituting our nation, by creating a revolution against law and culture that value property over humanity.

Fifty years ago James Baldwin insisted that we “dare everything” and “demand the impossible.”<sup>114</sup> He called on us to “take off the masks that we fear we cannot live without and know we cannot live within.”<sup>115</sup> He proclaimed, “The price of the liberation of the white people is the liberation of the blacks—the total liberation, in the cities, in the towns, before the law, and in the mind.”<sup>116</sup> This is the lesson of Black Lives Matter. Our children are “Teaching Ferguson” again. Listen well.

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FgAG] (last visited Jan. 1, 2015) (showing that African-Americans make up roughly 1 million of the total 2.3 million incarcerated people, and are incarcerated at nearly six times the rate of whites. As of 2001, 1 out of 6 black men has been incarcerated). See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

112. Nelson D. Schwartz & Michael Cooper, *Racial Diversity Efforts Ebb for Elite Careers, Analysis Finds*, N.Y. TIMES (May 27, 2013), <http://www.nytimes.com/2013/05/28/us/texas-firm-highlights-struggle-for-black-professionals.html?pagewanted=all>; see also Patricia Cohen, *For Recent Black College Graduates, a Tougher Road to Employment*, N. Y. TIMES (Dec. 24, 2014), <http://www.nytimes.com/2014/12/25/business/for-recent-black-college-graduates-a-tougher-road-to-employment.html?partner=rss&cmc=rss&r=0>.

113. Nikole Hannah-Jones, *How School Segregation Divides Ferguson—and the United States*, N.Y. TIMES (Dec. 19, 2014), <http://www.nytimes.com/2014/12/21/sunday-review/why-are-our-schools-still-segregated.html> (“The Normandy School district [where Michael Brown attended school] is among the poorest and most segregated in Missouri. It ranks last overall in academic performance. Its rating on an annual state assessment was so dismal that by the time Mr. Brown graduated the district had lost its accreditation. . . . Just five miles down the road from Normandy lies Clayton, the wealthy county seat where a grand jury recently deliberated the fate of Darren Wilson, the officer who killed Mr. Brown. Success there looks very different. The Clayton public schools are predominantly white, with almost no poverty of which to speak. The district is regularly ranked in the top 10 percent in the state. More than 96 percent of its students graduate. Eighty-four percent head to four-year universities.”).

114. BALDWIN, *supra* note 1.

115. *Id.* at 128.

116. *Id.* at 130.